

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE BRANDON MOORE,

Defendant-Appellant.

UNPUBLISHED

August 24, 1999

No. 195638

Calhoun Circuit Court

LC No. 95-001799 FC

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

KELLY, J. (dissenting).

I believe the trial court erred in refusing to instruct the jury on the lessor offense of fourth-degree criminal sexual conduct because such an instruction was timely requested and I believe, was support by a rational view of the evidence in the factually bizarre situation depicted by the witnesses at this trial.

The requested misdemeanor charge was supported by the defense theory as well as reasonable inferences flowing from the evidence. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). There was no conclusive medical or forensic evidence of penetration, in fact the State Police Officer from the microchem unit of the State Police crime lab testified she did not find any seminal fluid or sperm cells on the clothing samples supplied by the complaining witness. Officer Milch stated there is a high probability that they would be present on a person's underwear if there was ejaculation and someone dressed quickly. Veronica Schoonard testified when she came up to the front door she saw the victim and defendant jump from two different place and that both had their clothes on. The doctor from the emergency department at Battle Creek Community Hospital testified that he examined Sarah, albeit the next day, and was unable to determine whether Sarah had been penetrated or even sexually assaulted. Finally and most peculiarly , the complainant was in a telephone conversation during the entire episode and never reported any sexual assault or asked for help from the person or persons on the other end of the line.

In sum, I believe the jury should have had the option of finding defendant guilty of a criminal sexual conduct offense involving contact but not penetration as such lessor offense would

be consistent with the evidence and the defense theory of this case. I would reverse and remand for a new trial.

/s/ Michael J. Kelly